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Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 276.

JOHNSON BLACKFEATHER, THE PRINCIPAL CHIEF OF THE SHAWNEE TRIBE OF INDIANS FOR THE USE AND BENEFIT OF THE SHAWNEE INDIANS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

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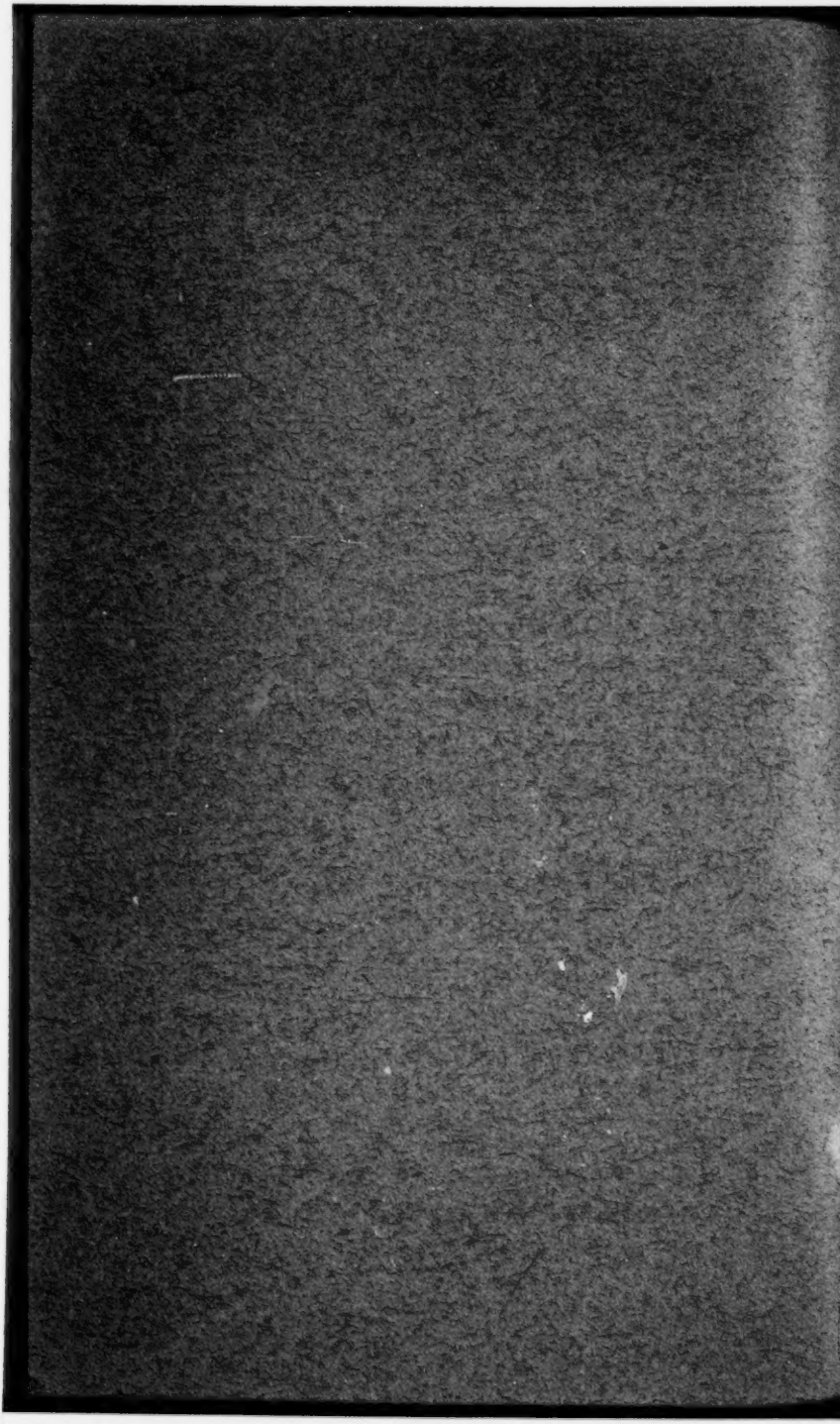

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vs.

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Statement of the Case.

Johnson Blackfeather, an Indian by blood and descent, is the principal chief of the Shawnee tribe of Indians, and resides at or near Vinita, Delaware district, Cherokee Nation, in the Indian Territory. On the 28th day of December, 1891, he filed his original petition in the Court of Claims, and on the 3rd day of August, 1892, he filed in lieu of said original petition, his amended petition. The

amended petition (Record, p. 1) states in substance: That the suit is brought in the Court of Claims under the provisions of the act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October 1, 1890, and an act supplementary and amendatory to the aforesaid act, approved July 6, 1892. The petition was filed for the use and benefit of the Shawnee Indians, to recover and collect from the United States Government the several, respective and aggregate amounts of money therein alleged, for the destruction, loss, forcible taking, carrying and driving away live stock, farm products, household goods, money, and other personal property of divers descriptions and kinds belonging to, owned and possessed by, and the property of the said Shawnee Indians, by white and United States citizens and soldiers, in the State of Kansas and the Indian Territory at divers times and places in the year 1861, and all the time up to and including the year 1866. A descriptive list or schedule, setting out the names of the Shawnee Indians whose property was taken and despoiled, and the amounts of money claimed as the price and valuation of said property so taken is appended to said amended petition. A portion of said claim was ascertained and determined by the Secretary of the Interior in the month of January, 1867, amounting to $109,746.25. The Secretary of the Interior transmitted the amount so ascertained, to Congress, with the recommendation that it be paid (Record, pp. 11-12).

The petition further represents that the claims sued for arise out of treaty relations with the United States, and as rights growing out of such treaties, to wit, articles 11 and 14 of the Treaty of May 10, 1854, and the acts of Congress, to wit, sections 2154 and 2155 of Revised Statutes.

It alleges that the property described and referred to was taken from the Shawnee Indians, and the depredations committed against their property by white men, citizens and soldiers of the United States, subsequent to the time when said Indians entered into the Treaty of May 10, 1854, and while said Indians were located and permanently residing and living peaceably on their own lands in the State of Kansas and the Indian Territory, and that they were residing in amity and peace with the cititizens of the United States and of the surrounding States, and with all the Indians and Indian tribes; that said Indians owned and possessed their lands in said State and Territory under the provisions and stipulations of treaties entered into with the United States in the months of November, 1825, August 1831, and May, 1854; that they occupied and possessed their lands as their homesteads and their farms; and that they at all times since the making and entering into said treaties, have done, performed, rendered and kept all the covenants, obligations, promises, agreements and duties stipulated and provided in all of the articles of the aforesaid treaties, and in all of the treaties made by and between the Shawnee tribe and the United States; and that they have at all times abstained from the commission of depredations, and have complied with the laws in such cases made and provided; that they have been loyal and true to the United States Government; that during the late rebellion the said Shawnees were loyal to the Union cause and a large number enlisted and served in the military service of the United States; and that the said Shawnee Indians have never sought private revenge, nor attempted to obtain satisfaction by any force or violence, on account of the taking and despoiling them of their property. And the petition further asserts that no part of said prop-

erty has ever been returned to the said claimants, nor have they ever received payment in money. Judgment is prayed for the amount of the aforementioned claims and for relief.

To this amended petition the Government filed a demurrer upon the grounds that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court and judgment rendered against the petitioner. From that judgment an appeal was taken and allowed to the Supreme Court of the United States.

Assignment of Errors.

1st. The Court of Claims erred in sustaining the demurrer filed by the United States.

2nd. The Court of Claims erred in holding that the amended petition does not allege facts sufficient to constitute a cause of action.

3rd. The Court of Claims erred in deciding and holding that the petitioner was not entitled to relief under the law and under the provisions of the treaty of May 10, 1854, and other treaties made with the Shawnee Indians.

4th. The Court of Claims erred in finding and holding that the claimant was not entitled to sue under the statutes passed and approved October 1, 1890, and the supplementary act, approved July 6, 1892.

5th. For other errors appearing in the record of the case.

ARGUMENT.

I.

The Court has Jurisdiction.

Upon the hearing in the court below two points were made by the learned Atterney-General in support of the

demurrer which he filed. (1) That the Court of Claims has no jurisdiction to try the case, and particularly that it had no right to maintain an action brought by the principal chief of the tribe, for the use and benefit of the individual members of the tribe. (2) That the petition does not state facts sufficient to constitute a cause of action or entitle the claimant to any relief.

Jurisdiction.

1st. As to the question of jurisdiction, the claims sued for consist of losses and injuries sustained by the individual members of the Shawnee tribe, and particularly property appropriated for the use of the Army. A schedule of these losses is annexed to the petition, and it seems to be claimed by the Attorney-General that for this kind of losses and damages Congress has not afforded any relief, and that the damages contemplated by the statute are only such as are sustained by the tribe in their tribal capacity. We submit that a fair construction of the statute of October 1, 1890, and the supplementary act of July 6, 1892, clearly authorizes the court to consider and adjudicate the class of claims which are presented in this petition. The act of October 1, 1890 is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen

of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians, June seventh, eighteen hundred and sixty-nine, approved by the President, June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians, April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject-mater herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due, either in law or equity, and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation out of any money or funds which have or may be paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen, and in their behalf and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases; and copies of the petitions filed in the case at the commencement of the suit shall be served upon the Attorney-General of the United States and on the principal chief of the Cherokee Nation by the marshal of the district court for the Indian Territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney-General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee

Nation by execution, mandamus, or in any other way which the said court may see fit.

SEC. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government in the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right to appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Approved October 1, 1890.

The following is the supplementary act of July 6, 1892:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October first, eighteen hundred and ninety, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them, and the United States.

Approved July 6, 1892.

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As will be seen, the first section of the act of 1890 declares that the jurisdiction is conferred upon the Court of Claims, "to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians who are settled and incorporated in the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude," etc. This provision speaks, not of the Shawnee and Delaware tribes, but of the Shawnee and Delaware Indians, clearly meaning, that it refers to Indians who belong to the Shawnee and Delaware tribes, and who live in the territory named. And it extends to any member of either of those tribes the right to bring suit to recover for such damages or injuries as he may have sustained. Under this provision, so far as the method of bringing suit is concerned, it clearly refers to the Indians themselves, and gives to any member of the tribe the right to bring an action.

Section 2 of the act provides: "That the said Shawnees, Delawares and freedmen shall have a right to begin and prosecute a suit or suits, *either separately or jointly.*"

Section 3 provides: "That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen, and in their behalf and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the right of such Indians be impaired by any acts passed and approved by the Cherokee national council."

The 4th section of the act provides: "That the said Shawnee Indians are hereby authorized and empowered to begin and bring a suit in law or equity against the United States Government in the Court of Claims," etc.

Taking all these provisions together, and giving them a fair and intelligent construction, it must appear to the court that the law was enacted for the benefit of the Indians belonging to these tribes, and that their individual rights and interests were to be considered by the court; and it must very clearly appear that they had the privilege of bringing suits in their individual names, or, they might bring suits by a trustee acting or speaking for them. That this was the evident purpose of Congress is clearly shown, not only by the letter of the statute itself, but by concurrent history. The greatest wrong sustained by those who belonged to the Shawnee and Delaware tribes did not consist in those injuries which bore against the tribes themselves as tribes, but in those which were borne and suffered by individual members—in the loss and destruction of property, the despoiling of farms and plantations, the taking of cattle, and provisions. These wrongs were perpetrated against individuals and not against the tribes as such. Congress would be doing a vain thing in providing by statute for the bringing of suits which related alone to injuries sustained by a tribe, leaving out the substantial damages which were sustained by individual members of the tribe.

If it is contended, however, that the act of October 1, 1890, referred particularly to the claims of these two tribes as such, or, to the treaties of July 19, 1866, and June 7, 1869, and articles of agreement of April 8, 1867 (which we do not admit), certainly the supplementary act of July 6, 1892, removes all possible doubt as to the character and kind of claimants who were to be permitted to sue, as well as to the character and kind of claims which were authorized to be prosecuted in the Court of Claims. For this act declares that these people "shall present to the said court *all their* claims against the United States,

and the Cherokee Nation, or against either or both of them, of *every description whatsoever*, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, *express or implied*, under such treaties made and entered into by and between these said Shawnees and Cherokees, and between them or either of them and the United States." This last provision of the act of 1892, is intended to cover every sort of claim, whether in behalf of the tribe or in behalf of individual members of the tribe. The language could not have been made broader or more comprehensive, and the evident intention of Congress was that *all* claims, tribal or individual, of whatever name or nature, should be considered and adjusted by the Court of Claims.

It would be absurd for Congress to enact a law authorizing the adjustment of claims, but confining it to such narrow limits, as to exclude from consideration the great body of injuries sustained by individual members of the tribe. It would be "the play of Hamlet, with Hamlet left out." It was intended that the whole business should be settled; everything arising out of treaty relations, and every contract, express or implied, growing out of treaties, or treaty relations, was to be brought within the jurisdiction of the court. If the Shawnee Indians had failed to present to the court, by the way of petition or otherwise, their claims, as individual sufferers, within the period of time named in the statute, they would have been absolutely barred from all relief.

The only practical question therefor, is not as to the right to bring suit, but as to the manner of bringing suits under the acts of 1890 and 1892. That is to say, whether these suits should be brought in the name of the individual Indians who had sustained injury, or in the name of some party speaking for and representing them.

Upon this subject, it seems to us, there can be no doubt as to the propriety of bringing suit in the name of their trustee. The acts of Congress expressly say that the suits may be brought by a trustee, or jointly or severally. It is a practice approved by all the courts, that where there are a large number of persons entitled to relief, one may bring suit for himself and the others. In the present instance, if the contention of the Government is correct, there would need to be over 600 suits instead of one. As far as the question of the jurisdiction of the court is concerned, the right of these Indians to appear in the manner in which they have, and be represented by Johnson Blackfeather, their chief, as their trustee and agent, is well established. It saves a multiplicity of suits, and is in harmony with the spirit of the law and the practice of courts in such cases.

II.

Liability of Government Under Treaty.

The other question, and by far the most important one in the case, is as to the right of these Shawnee Indians to recover for the damages sustained by them under the law as it exists and the treaties which have been made between the Indians and the Government. The subject is a broad one. A judgment is sought to be recovered under the provisions of the Treaty of May 10, 1854, and under the law existing as applicable to such treaty.

What, therefor, is the true construction of this instrument? It should be remarked that the relations of the Government to the Indian tribes is a different relation from any that exists towards any other class of people in the United States. From the beginning, and ever since

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the adoption of the present Constitution, the Indians have been regarded, to a certain extent, as the wards of the nation. The Government has, by slow, and at times almost imperceptible approaches, gradually succeeded in getting possession of the Indian lands. This has been done through the agency of treaties made between the parties; and two ideas have been prominent in the history of all legislation on the subject of the Indians or the Indian tribes. They are, first, that the Indians are under the especial care and protection of the United States, and second, that in consideration of this protection they are to yield loyal obedience to the government; they are to obey the laws; they are never to take the law into their own hands, nor attempt to punish those who may perpetrate crimes or wrongs against them. It is a matter of obedience on the part of the Indians, and protection on the part of the government. The Indians shall yield obedience, although no part of the United States, and having no citizenship, and on the other hand, the Government shall, to a certain extent, take charge of their affairs, protect them from wrongs and injuries that might be committed against them, and do whatever is necessary to secure to them the full enjoyment of their rights. It is not in the power of the Government to relieve itself from this obligation of protection which it has assumed.

The Government's Policy in Dealing With the Indians.

For more than a hundred years the United States has been dealing with the Indians and the Indian tribes. It has passed laws regulating their management and their affairs, and it has also entered into treaties with them, from

time to time. The general effect of their treatment by the Government has been to crowd them out of the lands which they originally owned and occupied. This has been done in almost every instance by the United States agreeing to protect and care for them in consideration that they shall convey their lands, or move away therefrom to far distant settlements on the borders of civilization, and in all respects act according to the wishes of the government. In some cases the Government has traded lands with the Indians, and made arrangements to remove them from the places where they lived to new territory, and it has provided in its treaties to pay them annuties, furnish them money for establishing their settlements in the new country, enabling them to establish schools, furnishing them with agricultural implements, and whatever seemed necessary for their occupancy and enjoyment of the territory to which they were sent. In all this business they have been treated as minor children, under the care and guardianship of the Government, and it has been distinctly understood that while they owe allegiance to the Government, and while they are not permitted to avenge any wrongs which they may conceive to have been committed against them, and while they must be peaceable in all things, and refrain from acts of violence, yet in consideration for this surrender of the right to govern and manage their affairs, and settle their own difficulties, and give up their former customs, the Government, upon its part, has agreed to give them absolute protection, and make good to them any losses which they may have sustained by reason of the depredations committed against them or otherwise. One of the matters to which the attention of the Indians and the Government has been called, is that which relates to depredations committed by white people and citizens of the United States upon the lands of the Indians.

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Treaties between the United States and Indians.

This policy of obedience and loyalty upon the part of the Indians to the United States, and protection to the Indians, and the vindication of their rights by the Government, and the payment to them for damages and losses sustained, was inaugurated at a very early day, even before the adoption of the present Constitution.

A treaty was made and concluded between the Shawnee Indians and the United States on the thirty-first day of January, one thousand seven hundred and eighty-six. It related to the delivery up of hostages by the Shawnees to the Government; to the punishment of crimes committed within the territory occupied by the Shawnees; and it allotted lands to the Indians in that part of the United States territory which is now the State of Ohio.

The second article of the treaty is in the following words:

> "Article 2. The Shawnee Nation do acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded to them by a treaty of peace made between them and the King of Great Britain, the fourteenth day of January, one thousand seven hundred and eighty-four."

Article 5 reads as follows:

> "The United States do grant peace to the Shawnee Nation, and do receive them into their friendship and protection."

Thus, at an early day, the doctrine of obedience and loyalty on the one hand, and of protection upon the other hand, was inaugurated as the policy of the Government,

and it has been continued ever since, not only with the Shawnees, but with other tribes occupying the territory of the United States.

The treaty made by the United States with the Great and Little Osages, and which was ratified April 28, 1810, contains the following paragraph:

> "And the United States hereby guarantee to any Indian or Indians of the said nations, respectively, a full indemnification for any horses or other property which may be stolen from them by any of their citizens."

In a treaty made between the United States and the Blackfoot Nation of Indians, which was proclaimed March 17, 1866, article 7 therein reads as follows:

> "Article 7. The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries, respectively, occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit."

In addition to the foregoing guarantee of protection the same treaty provides in article 9, that twenty thousand dollars, annually, is to be expended by the United States in such useful goods and provisions, as the President, in his discretion, may from time to time determine.

Article 10 provides that they shall be paid fifteen thousand dollars, annually, to be used in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and promoting their civilization and christianization.

In a treaty between the United States and the Belantseetea or Minnetare tribe of Indians, proclaimed February 6, 1826, the following provision is contained in article 6.

> "And the United States hereby guarantee to any Indian or Indians of said tribe a full indemnification for any horses or other property which may be stolen from them by any of their citizens: *Provided*, That the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States."

In a treaty proclaimed April 10, 1855, between the United States and the Chasta and other tribes of Indians, article 3, after providing for the payment of certain sums of money and annuities for the period of fifteen years, has the following:

> "The United States also agree to appropriate the additional sum of five thousand dollars, for the payment of the claims of persons whose property has been stolen or destroyed by any of the said united bands of Indians since the first day of January, 1849."

A treaty concluded between the United States and the Cherokee tribe of Indians as far back as November 22, 1785, provides in article 3 that:

> "The said Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whatsoever."

Article 4, of the treaty between the United States and the Snake Indians, is as follows:

"Article 4. In case of any depredation being committed upon the person or property of any member of the aforesaid tribe, it is stipulated that no attempt at revenge, retaliation or reclamation shall be made by said tribe; but the case shall be reported to the agent or superintendent in charge, and the United States guarantee that such depredation shall be punished in the same manner as if committed against white persons, and that the property shall be restored to the owner."

In the treaty with the Seminoles, in 1866, in return for pledges of peace and friendship:

"The United States guarantee them quiet possession of their country and protection against hostilities on the part of other tribes, and, in the event of such hostilities, that the tribe commencing and prosecuting the same shall make just reparation therefor."

In the treaty with the Delawares of July 17, 1854, the following occurs:

"The Delawares acknowledge their dependence on the Government of the United States and invoke its protection and care. They desire to be protected from depredations and injuries of every kind * * * and if, unhappily, any difficulty should arise, they will at all times, as far as they are able, comply with the law in such cases made and provided, as they will expect to be protected and their rights vindicated, when they are injured."

In article 11, of the treaty of 1866, the following appears:

"The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the Government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights."

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A treaty with the Miamis, in 1839, has the following:

> "And when the said tribe shall have emigrated the United States shall protect the said tribe and the people thereof in their just rights and possessions against the injuries, encroachments, and oppressions of any person or persons, tribe or tribes, whatsoever."

Article 10 of the treaty with the Ottawas contains the following:

> "It is stipulated that the United States shall pay to the said Ottawas the claims for stolen ponies, cattle and timber, already reported and approved by the Secretary of the Interior, amounting to $13,005.95. And also all other claims for damages within two years, or since the taking of testimony for the above-mentioned damages, upon the presentation of sufficient proof."

The foregoing and many other provisions found in the treaties respectively entered into between the United States and Indian tribes, which could be cited, are clearly sufficient to establish what is the recognized policy of the United States in dealing with the Indians.

III.

THE TREATY OF 1854.

It is a Contract of Indemnity Against Loss or Damage.

Coming now to the Treaty with the Shawnee Indians on the 10th of May, 1854, let us inquire what is its true meaning; what did the parties to said treaty intend; and what was understood by them in the making of such treaty? It was a very important treaty, and embraced a variety of subjects. It related to a cession by the Indians

of a large tract of country lying west of the State of Missouri, which had before that time been set apart to the Shawnees; and, on the other hand, it related to the cession by the United States to the Shawnees of a tract of 200,000 acres of land; it related also, to schools, churches, and the improvement of the condition of the Shawnees; it attempted to regulate their affairs, to a large extent, among themselves; it provided for selections of land by individual members of the tribe; also to the taking of a census of the tribe; and it had much to say in regard to the proceeds of the sale of lands, and the survey of the same; it seems to have intended that there should be a substantial settlement between the Government and the tribes of all their affairs, and all the matters growing out of former relations between the Government and the Indians; it related to the payment of installments of money to the individual members of the tribe, and furnished a rule for their guidance in the future.

But the parts with which we are more particularly concerned are found in Articles 11 and 14.

Article eleven reads as follows:

> "Article 11. It being represented that many of the Shawnees have sustained damage and loss and destruction of their crops, stock and other property, and otherwise, by reason of the great emigration which has for several years passed through their country, and of other causes, in violation, as they allege, of guarantees made for their protection by the United States, it is agreed that there shall be paid in consideration thereof, to the Shawnees, the sum of twenty-seven thousand dollars, which shall be taken and considered in full satisfaction not only of such claim but of all others of what kind soever, and in release of all demands and

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stipulations arising under former treaties, with the exception of the perpetual annuities amounting to three thousand dollars, hereinbefore named, and which are set apart and appropriated in the third article hereof. All Shawnees who have sustained damages by the emigration of citizens of the United States, or by other acts of such citizens, shall, within six months after the ratification of this treaty, file their claims for such damages with the Shawnee agent, to be submitted by him to the Shawnee council for their action and decision, and the amount in each case approved shall be paid by the said agent: *Provided*, the whole amount of the claims thus approved shall not exceed the said sum stipulated for in this article: *And provided*, that if such amount shall exceed the sum, then a reduction shall be *pro rata* from each claim until the aggregate is lowered to that amount. If less than that amount be adjudged to be due, the residue, it is agreed, shall be appropriated as the council shall direct."

Thus, article 11 recognizes the fact that the Indians had sustained damages in the loss and destruction of their crops, stock and other property, and otherwise, by reason of great emigration, which had for several years passed through their country, and of other causes in violation, as they allege, of the guarantee made for their protection by the United States. And it was provided, that for the loss and damage which they had sustained, they should be paid the sum of $27,000. Here is a clear recognition of the fact that the United States felt itself under obligation, and was bound to pay for the damages which the Indians had sustained.

Article 11 establishes a precedent, or rather, is a continuation of the precedent, which had been established by the Government in the various cases with their Indian

tribes. The effect of the transaction was: "we, the Indians of the Shawnee tribe, agree to obey and yield allegiance to the United States; we agree to abstain from all violence and all attempts to punish those whom we conceive to have committed wrongs against us; in consideration that the Government shall give us adequate protection; and shall make good all the losses we have sustained."

This, of course, related to all losses sustained by the Indians prior to the date of the execution of the Treaty. If the Treaty had stopped at this point, it might be a matter of doubt whether the claim of the Indians for depredations committed after that date could be maintained except under the general law of implied contracts; but, fortunately, section 14 is brought in, and is, of course, as binding upon the Indians, on the one hand, and the Government on the other, as is section 11.

That section is as follows:

> "Article 14. The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated."

Section 11 of the Treaty provided for and settled that which had taken place in the past. The payment of the sum of $27,000 for the destruction of crops, stock, and other property, in consequence of the violation of the United States of its guarantee of protection, was the completion and adjustment of all which had preceded such settlement, and was the admission by the Government of

its liability to pay damages under the treaties made with the Indians.

Section 14 above quoted, relates solely to the future, but it is to be interpreted in the light of past transactions. As the United States, under its promise of protection, had acknowledged and satisfied its liability for past damages and injuries to the Indians, so did it agree in Section 14 to continue the same policy of protection and satisfaction. But Section 14 is even stronger in favor of the Indians than the mere promise of protection. It is a substantial agreement upon the part of the Government to satisfy the claims of the Indians for such injuries as might be suffered thereafter, and was undoubtedly so intended by both parties to the Treaty. The section may be divided into two parts or provisions, so far as the Government is concerned :

First, PROTECTION.

Second, VINDICATION.

What is the true and just meaning of these provisions? It has already been shown that the Government, under its promise of protection, felt itself bound to pay to the Indians such sums as would compensate them for the damages sustained. And if this was the only clause in the section it might well be contended that it was broad enough to justify and require a settlement by the United States for the losses suffered by the Shawnees.

"Protection," as defined by Webster, means "the act of protecting; preservation from loss, injury, or annoyance." "To protect" is "to cover, shield from danger or injury."

The 11th section of the treaty of 1854 places the obligation of the Government upon this ground—damages

arising from *a failure to protect*. The language used in the treaty is "in violation, as they allege, of guarantees made for their protection." It was in consideration of this that the United States agreed to pay and did pay the sum of $27,000.

The second clause of the 14th section is, however, broader and stronger than the first. Not only is the Government bound to give protection to the Indians, but it is also bound to vindicate their rights. These rights were a peaceable possession and enjoyment of the lands and territory where they lived. It included all their personal and property rights; it meant protection from invasion by outsiders, whether soldiers of the United States or private citizens of the United States; and if by the conduct of the soldiers or citizens substantial injury was sustained, then that should be made good to the Indians.

As already stated, *vindication* means more than protection. One of Webster's definitions of the verb "vindicate" is "to defend *with success;* to prove to be just or valid; to maintain; to assert; to defend; to justify." The noun "vindication" is defined to be "the act of vindicating; defense; justification," etc.

This is what the United States, by section 14 of the treaty of 1854, agreed to do. And this is undoubtedly what was understood by both parties to the treaty. The Indians were to continue their loyalty and good conduct, and the United States was to continue its protection and vindicate their rights. If they suffered injuries the United States was to make them good. That this was the understanding on the part of the Government is not only to be inferred from the language of the treaty itself, but also from the conduct of the officers of the Government who had this subject in charge.

IV.

THE KIND OF INJURIES SUSTAINED.

The Law Implies a Promise to Pay and the Treaty Guarantees its Performance.

After the execution of the treaty of 1854, and the settlement and adjustment of the losses and damages which had been sustained by the Indians, as set forth in article 11, other and greater damages and injuries were suffered by the Shawnees.

The Civil war begun in 1861 and ended in 1865–6. During this period the armies of the United States camped upon and marched over the lands and territories of the Shawnee Indians, and while in occupancy of the lands the Army seized and appropriated horses, cattle, sheep, hogs and provisions for the maintenance of the Army, and to carry on Army operations. It was an appropriation of private property for public use. The schedule attached to, and made a part of the petition in this case, shows that of the $530,000 worth of property taken, more than $500,000 consisted of live stock and provisions, and the letter of the Commissioner of Indian Affairs (p. 12) says, that "it is apparent from an examination of the evidence that the Government had the use for its troops of a large amount of the property taken." The Indians were literally robbed of their property at a time when they were friendly and loyal to the Government, and many of them were soldiers in the Union Army. All this too at a period when the United States was bound by solemn treaty obligations to protect these Indians and vindicate their rights. The Government, without any treaty or statute, would be liable for the appropriation of

the property of a private citizen by the Army. How much stronger and higher is its obligation when the property is taken from its wards, those who by treaty are held to be under its especial care?

It will not be disputed that with, or without, a treaty, the United States would be liable to compensate a person for property taken and appropriated for the use of the army or any other public use. If the Government takes the cattle or lands of the farmer, the law implies a promise to pay for it. This doctrine has been maintained for many years by all the courts, and especially by this court.

The Constitution of the United States expressly provides:

> "That no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

This doctrine is firmly imbedded in the Constitution. The Shawnee Indians were entitled to the benefit of this provision as much as was any citizen of the United States. It was, and is, their right, independent of any treaty obligation.

In addition to the general implied promise of the Government to pay for property taken, we have in the present case the special agreement to protect and vindicate the rights of the Shawnees, and among their rights is that of compensation for the property appropriated. The United States has given its bond to pay this money. It has been signed, sealed and delivered in the form of a solemn treaty. The faith of the Government is pledged to these people.

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The case here presented is founded in the highest equity. It appeals to every man's sense of justice. These people were living upon lands where they had been placed by the Government in consideration of the surrender of other lands with the promise of protection. They were engaged in the peaceful occupation of cultivating their farms; they had reared cattle, horses and other live stock; they had raised wheat, corn and other vegetable products; they had accumulated property, and had given themselves up to the arts of industry and peace; and they were loyal to the Union and obedient to its laws. When the army of the United States entered upon and despoiled their lands, seized and appropriated their property to government use, every consideration of honesty and good faith requires that the Government should grant them adequate relief, and it is believed that their appeal will not be made in vain.

V.

OFFICIAL CONTEMPORANEOUS INTERPRETATION.

Action of the Interior Department.

Fully recognizing the obligations of the Treaty, the Secretary of the Interior, as soon as it was made known to him that injuries were being sustained by the Indians, or that their property had been appropriated, ordered an inquiry to be made as to the extent and nature of such injuries. He thereupon appointed an agent of the Government to make an investigation of the subject and to take testimony. A large amount of testimony was taken and a report made by the agent to the Commissioner of Indian Affairs and to the Secretary of the Interior.

On the 23rd day of January, 1867, Lewis V. Bogy, Commissioner of Indian Affairs, addressed a communication to the Hon. O. H. Browning, Secretary of the Interior (Rec., pp. 11 and 12). We quote from such communication as follows:

> Sir: I have the honor to transmit herewith for your consideration sundry papers relative to the claims of Shawnee Indians, of Kansas, for indemnity for losses sustained by them during and since the late rebellion. These papers comprise copies of the letter of Agent Abbott transmitting them to this office and of a communication by the Shawnee Council upon the subject, besides the original report of Agent Abbott, before the testimony was taken, and the affidavits to establish the claims.
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> "The council base these claims upon the right of the Indians to protection from the Government of the United States while themselves observing their treaty stipulations, and reference is made for precedent to previous acts of Congress recognizing that right, particularly to article 11 of the Shawnee treaty of 1854, by which the sum of $27,000 was provided to be paid for losses of the Shawnees by immigrants passing through their country, and to Chapter XL of the laws of 1860 (vol. XII, Stat. at L., p. 15), by which the Government appropriated $36,711 for the payment of losses of these Indians during the then recent troubles of Kansas. The list of claims now presented, as stated in Agent Abbott's report, amounts to $106,928.75, but on examination of the papers, errors are found to exist, a correction of which makes the proper footing $109,746.25. * * *
> The course taken in 1860, when the Shawnee claims came under consideration by this office, was to refer the matter to the department, with the recommendation that Congress be requested to place an appropriation at the disposal of the department sufficient to pay the claims, so much of

the amount to be paid to the claimants as shall be found on further examination to be rightfully due. The same course is now recommended and for the following reasons, to-wit:

"1st. The Shawnees, as a friendly tribe, strictly regarding their treaty stipulations with the Government and abstaining from acts of private revenge or retaliation, but relying upon the good faith of the Government, are entitled to its protection under the 14th article of the treaty of 1854 and to remuneration for losses sustained at the hands of its citizens.

"2d. It is apparent from an examination of the evidence that the Government had the use for its troops of a large amount of the property taken.

"3d. There is an abundant *prima facie* case established to justify the department in asking Congress for an appropriation of a sufficient amount to meet the claims, and then the department can proceed to take such additional evidence as may be deemed necessary to enable it to do substantial justice in the premises."

Very respectfully, your obedient servant,

Hon. O. H. Browning,
Secretary of the Interior.

Lewis V. Bogy,
Commissioner.

Here is an interpretation by the Commissioner of Indian Affairs of Section 14 of the Treaty of 1854, and it is also made to appear that the damages sustained by the Indians arose, in a large part, by the use of the property of the Indians for the purpose of its troops and army operations. The claim of the Indians is, therefore, founded in the highest equity. Similar damages sustained by an American citizen would entitle him to

bring an action in the Court of Claims against the Government, under the General Statutes, without any reference to treaty obligations.

The case here presented is much stronger. The obligation of the Government arises out of a treaty, and that treaty made with its wards, and whose rights it is under the highest obligation to protect. The communication made by the Commissioner of Indian Affairs to the Secretary of the Interior was, by the Secretary, forwarded to the Chairman of the Committee on Appropriations of the House of Representatives in a letter of January 30, 1867, which reads as follows:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *January 30, 1867.*

Hon. THAD'S STEVENS, *Chairman Committee on Appropriations, House of Representatives.*

SIR: I have the honor to transmit herewith a copy of a communication, dated the 23d instant, from the Commissioner of Indian Affairs and accompanying papers submitted by him to this Department in relation to claims of Shawnee Indians of Kansas for indemnity for losses sustained by them during and subsequent to the late Rebellion, and who rely upon the stipulations of the 14th article of their treaty with the United States, of 10th May, 1854, 'to have their rights vindicated.' These papers comprise copies of the letter of Agent Abbott and of a communication by the Shawnee council upon the subject.

"The claims presented to the Department amount to $109,746.25, and in view of the facts set forth in the papers now enclosed the subject is commended to the favorable consideration of your committee.

"The report of Agent Abbott, a list of the Shaw-

nee claims, and the evidence sustaining the same are also herewith submitted.

"Very respectfully, your obedient servant,

(Signed.) O. H. BROWNING, *Secretary.*"

Here is again a recognition by the Secretary of the Interior of the justice of the claim, and the fact that it is made upon and under the stipulations of the 14th article of their treaty with the United States, of May 10, 1854, to have their rights *vindicated.* And it will be seen that the Secretary of the Interior recommends the subject to the favorable consideration of the House committee.

The understanding which the Government of the United States had of the meaning, force and effect of Section 14 of the Treaty of 1854, is made apparent. It is as if the treaty had said in express terms; We, the Shawnee Indians, acknowledge our dependence upon the Government; we will abstain from the commission of depredations; we will abide by the laws, and as if the Government on *its* part had said, in consideration of this; we will give you absolute protection, and indemnify and pay you for whatever losses you may sustain by reason of wrongs and injuries committed by the citizens or soldiers of the United States.

VI.

We insist that this is a fair and just construction and intrepretation of the Treaty of 1854, and that the Secretary of the Interior and the Commissioner of Indian Affairs were right in their interpretation of Section 14, and that there is now a substantial legal obligation on the part of the United States to pay these Indians for the damages which they have sustained.

The Construction of Treaties Should be Favorable to the Indians.

The Supreme Court of the United States has been called upon, in several instances, to give a construction to treaties made between the Indians and the United States, and in every instance, so far as we have been able to observe the court has given a construction favorable to the Indians. It looks upon them as persons entitled to the protection of the United States, and subject to the peculiar care of the Government. It treats the subject as a case between guardian and ward.

In the case of *Worcseter vs. The State of Georgia, 6. Peters, 515*, there is a discussion, to a certain extent, of this subject and of Indian treaties. Mr. Chief Justice Marshall, in delivering the opinion of the court, on page 582, says :

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word 'allotted', in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.
>
> "The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties ?

"The inquiry is not, what station shall now be given to the Indian tribes in our country? But, what relation have they sustained to us, since the commencement of our Government?

"We have made treaties with them; and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people? Does this lessen the obligations of such treaties?"

Applying the rule laid down by Mr. Chief Justice Marshall to the case under consideration, can there be any doubt as to what was the intention and expectation of the Shawnees at the time of the execution of the Treaty of 1854? The Government had agreed to protect them, had treated them as its wards, had paid damages for injuries they had sustained by reason of the depredations of the whites and soldiers upon their property, and they had every reason to believe that the same protection, the same care, and a like compensation for injuries sustained would be continued in the future as in the past.

The rule announced by Justice Marshall, above stated, is adhered to in the case of the Kansas Indians, reported in 5 Wall., p. 737. It is announced in the third paragraph of the syllabus, that the rules of interpretation favorable to the Indian tribes, are to be adopted in considering our treaties with them.

Mr. Justice Davis, in delivering the opinion of the Court, adopts the language of the Chief Justice and gives it his approval.

CONCLUSION.

We Therefore Respectfully Submit—

First. That the Court of Claims has jurisdiction of this

case; that under the statutes of October 1, 1890, and the supplementary act of July 6, 1892, the Shawnee Indians were authorized, either as individuals or by a trustee acting for them, to sue and recover for claims of every description whatsoever, and upon all contracts, express or implied.

Second. That the Shawnee Indians are the wards of the nation and under its especial care, and that all treaties between them and the United States should be favorably construed.

Third. That the treaty of May 10, 1854, is a contract by which the United States agreed to protect and vindicate the rights of the Shawnees; that among the rights to be protected and vindicated is that of the peaceable use and enjoyment of their lands and property; that, if their property is taken from them by white citizens or soldiers of the United States it is the duty of the Government to make good the losses so sustained, and that this is especially so where their property has been taken and appropriated for the support of the Army or any other public use; that under the Constitution of the United States it is the right of the Indians to have just compensation, and the terms of the treaty require the Government to maintain this right and answer in damages for the injury done.

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